No. 90-987

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

CHURCH OF SCIENTOLOGY OF CALIFORNIA,

*Petitioner*,

—v.—

UNITED STATES OF AMERICA and FRANK S. ZOLIN,

*Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## REPLY BRIEF OF PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## REPLY BRIEF OF PETITIONER

In its Brief in Opposition, the government never argues that petitioner Church of Scientology of California ("the Church") has incorrectly stated the proper legal standards for determining the crime-fraud exception to the attorney-client privilege. More important, the government never argues that the court of appeals applied these proper legal standards. Instead, the government argues that: 1) this case is somehow *sui generis* and that, therefore, *in this case* the appellate court is entitled to engage in its own fact finding and to ignore the district court's fact finding; 2) a court need not consider both parties' evidence before stripping away the privilege, so long as the privilege holder has had an opportunity to present its evidence to the court; and 3) because the court of appeals made conclusory, unsubstantiated findings of fact as to the

intent and purpose of the attorney-client communications, the petition raises no issue of importance.

This case in fact squarely presents the legal issues set forth in the petition, and the government, by in effect conceding that the court of appeals applied incorrect legal standards, highlights the appropriateness of granting the petition to resolve these important issues.[1]

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1 The government misstates the current status of this case in the district court. Resp. Br. 7 n.6. The Church did not seek a stay of the court of appeals' mandate because a stay of release of any of the documents involved in this case has been in effect in the district court since April 30, 1985, so long as the status of those documents are the subject of an appeal or petition. Pet. App. 35a. On January 14, 1991, *after* this petition was filed, and on the same day the government requested an extension of time from this Court to file its Brief in Opposition, the government appeared before the district court *without* notice to the Church or its counsel. Whatever "hearing" was held, Resp. Br. 7 n.6, was held *ex parte*. The government did not inform the district court of the Church's pending petition to this Court, failed to remind the court of its April 30, 1985 stay order, and asserted that the case was concluded, although both this Court and the court below had explicitly left open the issue whether the government had obtained the partial transcripts illegally. *United States* v. *Zolin*, 109 S.Ct. 2619, 2624 n.5, 2632 (1989); Pet. App. 4a n.2. On January 17, 1991, again *without* prior notice to the Church, the government obtained an *ex parte* order from the district court ordering the Los Angeles County Clerk to deliver the tapes to the government. On January 23, 1991, *again* without prior notice to the Church, the government obtained an *ex parte* order from a Los Angeles County Superior Court judge ordering the tapes released to the government. The government obtained the tapes that day. The Church first learned of these events on Friday, February 1, 1991, when the ordering Superior Court judge informed counsel of record herein that the government had previously obtained the tapes. On Monday, February 4, petitioner moved the district court to vacate its January 17 order, to reinstate its April 30, 1985 Order and to order the tapes returned to the district court. That same day, the district court stayed that part of its January 17 order which granted the government access to the tapes. On February 8, 1991, the court ordered the United States Attorney to collect all tapes and copies of the tapes or transcripts and hold them under his control pending further proceedings. A hearing is scheduled for March 11, 1991.

**I.** The government effectively concedes that the court of appeals reviewed *de novo* the evidence of crime or fraud in the attorney-client conversations at issue, including the issue of the client's intent in communicating with its attorneys. The government also concedes that this issue is a question of fact,[2] and does not deny that, as a general matter, the appropriate standard of appellate review of a district court's findings of fact regarding the attorney-client privilege is the clearly erroneous or abuse of discretion standard. Pet. 9-15. Moreover, the government does not deny that the district court originally applied a virtually identical analysis to the crime-fraud issue as this Court set forth in *United States* v. *Zolin*, 491 U.S. 554, 109 S.Ct. 2619 (1989), that it reviewed the same evidence that the court of appeals reviewed, and that it found that the evidence failed to show that the purpose of the communications was to obtain advice for the commission of crimes or fraud. Pet. 11.

Indeed, the government's *sole* justification for the court of appeals' action in reviewing the district court's findings of fact *de novo* is not that the court of appeals properly applied the law, but rather that this Court somehow instructed the court of appeals to review the evidence *de novo* and to ignore the district court's findings. Resp. Br. 8-9. Nothing in this Court's opinion in *Zolin* supports the government's imaginative argument. This Court merely remanded the matter to the court of appeals "for further proceedings, consistent with this opinion," *Zolin*, 109 S.Ct. at 2632, as it typically does in a case in which its decision does not finally resolve all issues. In stating in a footnote that "[t]he Court of Appeals also will have the opportunity to review the partial transcripts, and to determine whether . . . the IRS presented sufficient evidence to establish that the tapes are within the crime-fraud exception," *id.* at 2632 n.13, this Court could not have intended to and did not order the court below to ignore, violate, or sus-

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2 Thus, the government states that, "as the district court properly observed on remand . . . 'the Court of Appeals has made the only relevant *finding of fact*. . . .' " Resp. Br. 7 n.6 (emphasis added) (quoting district court Order of Jan. 17, 1991, at 1).

pend the proper legal standards of appellate review. In any event, the court of appeals did not indicate whether it reviewed the evidence *de novo* because of this Court's remand order in *Zolin* or because it was following the Ninth Circuit's maverick standard applying *de novo* review to the crime-fraud issue. Pet. 10-11.[3]

In essence, the government is arguing nothing more than that *this* petitioner alone is not entitled to the proper standard of appellate review merely because this Court did not explicitly instruct the court of appeals to apply that standard on remand. Because the court of appeal's *de novo* review of the evidence conflicts with decisions of this Court and other courts of appeals, Pet. 9-15, this Court should grant the petition on this important issue.[4]

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3 Petitioner suggests that it may be appropriate for this Court, pursuant to Sup. Ct. R. 16.1, to grant the petition and remand this matter without further briefing or argument to the court of appeals for application of the proper standard of review, particularly in light of the following: (1) this Court's interest and authority in insuring that its remand instructions are not misconstrued; (2) the government's failure to dispute the Church's arguments as to the proper legal standard; and (3) the government's concession that the court of appeals made *de novo* findings of fact, purportedly pursuant to this Court's remand order. If this Court adopts this procedure, petitioner submits that this Court should further indicate that the court of appeals, in reviewing the district court's findings pursuant to a clear error or abuse of discretion standard, should consider *all* the evidence that was before the district court, and not just the evidence submitted by the government. *See* Point II, *infra*; Pet. 15-18.

4 The government argues that, "even under a deferential standard of review," the district court "plainly erred." Resp. Br. 9 n.8. The issue, however, is not whether the government thinks the district court clearly erred, but rather whether an appellate court would so find. This petitioner, like every other party, is entitled to that determination. Moreover, despite the government's baseless accusations, there is not a shred of evidence that the participants in the conversations retroactively generated false documents to mislead the IRS about the true nature of a transaction or that the *purpose* of the communications was to seek advice for such activity. *See Zolin*, 109 S.Ct. at 2626; Pet. 22-27.

**II.** The government does not dispute the Church's argument that a court should review both parties' evidence before it finds that the crime-fraud exception to the attorney-client privilege applies. Pet. 15-18. In addition, the government understandably does not assert that the court below evaluated the Church's evidence before determining that the crime-fraud exception applies. Rather, the government argues only that the court of appeals had the Church's evidence before it when it made its decision.

The issue, however, is not whether the privilege holder presented its evidence; the question is whether the court considered that evidence as relevant to its inquiry. The court of appeals' decision is explicit that the Church's evidence formed no part of its inquiry and analysis. *See* Pet. App. 3a (court examined "*only*" the two declarations of IRS Agent Petersell and the partial transcripts) (emphasis added); Pet. 17-18. Moreover, the court of appeals' explicit reliance on a "prima facie" evidentiary showing as sufficient to dispel the privilege, Pet. App. 3a, reinforces the conclusion that the court of appeals did not consider the Church's evidence to be legally relevant. *See Zolin*, 109 S.Ct. at 2626 & n.7; Pet. 15-16.

As previously shown, Pet. 23, the Church's evidence placed the MCCS tapes in context and helped to demonstrate that the purpose of the communications was not to further a crime or fraud. The government attempts to refute the importance of this evidence by relying on the legally irrelevant (and wholly unsubstantiated) assertion that the MCCS project purportedly involved the intentional violation of the tax laws. Resp. Br. 11 n.9. The only legally relevant inquiry, however, is whether the "*communications* [are] made *for the purpose* of *getting advice* for the commission of a fraud or crime." *Zolin*, 109 S.Ct. at 2626 (emphasis added, internal quotations omitted). As the *government's* own evidence demonstrated, whatever the alleged purpose of the MCCS project itself, the purpose of seeking legal advice was solely "to ascertain whether the restructuring could be accomplished

*legally*," Supp. E.R. 70, ¶ 17 (emphasis added); Pet. 22, and was not to further any crime or fraud.

In light of the Church's unrefuted assertion that the correct legal standard would require a court to evaluate both parties' evidence, and the court of appeals' indisputable failure to do so, the petition should be granted to resolve this issue.[5]

**III.** The government asserts that the conclusory, unsubstantiated finding below that the crime-fraud exception applies raises no issue of whether the court of appeals so misconstrued the scope of the crime-fraud exception as to chill necessary and important attorney-client communications. The only scrap of "evidence" upon which the government relies is the court below's assertion that "[t]he figures involved in MCCS admit on the tapes that they are attempting to confuse and defraud the U.S. government." Pet. App. 4a; Resp. Br. 12 n.11.

Yet, the court below nowhere states where such an admission is made, and the government, in all its briefs and arguments, never points to such an admission. Presumably, if such an admission existed, the court of appeals would have cited it, the government would have presented it to the district court, and the district court would presumably have been persuaded by such an admission. The fact is, however, that no such admission exists on the transcripts.

The court below's conclusory, unsubstantiated findings of fact reflect not so much a "careful[ ] review[ ]" of the transcripts, Resp. Br. 12, but a casual analysis divorced from the

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5 The government fails to respond to the Church's argument that a court should not dispel the privilege and release otherwise privileged documents without first reviewing the documents *in camera*, if only to redact those portions unrelated to the purported crime or fraud, at least when so urged, as here, by the privilege holder. In the absence of any response, petitioner relies on its prior arguments. Pet. 18-20.

complex context in which these communications occurred.[6] Indeed, the court's findings highlight the necessity of the legal standard in which the district court makes findings of fact and the court of appeals reviews those fact findings for clear error.

In the absence of any further response, the Church otherwise relies on its prior arguments on this point. Pet. 21-28. The issue, as the Church made clear therein, is not merely that the court below erred in its factual findings of the intent and purpose of the communications, but that the court below clearly misconstrued the scope of the privilege and the crime-fraud exception, and that its legal standard will inevitably chill the types of full and frank attorney-client conversations necessary to restructure business and corporate relationships to avoid problems in the future or to prepare a defense to pending or potential prosecution or enforcement proceedings.

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6 The government's assertion that the court of appeals "carefully reviewed" this matter, is belied by two other significant errors in the court's decision. First, the court ordered that the tapes be admitted "into evidence," Pet. App. 4a, although, as the government acknowledges, the government has never sought to admit the tapes into evidence, Resp. Br. 7 n.6, and there is no proceeding into which they could be admitted. Pet. 6 n.2. Second, the court stated it would not consider "[t]he issue of the potential illegality of the transcripts," Pet. App. 4a, because "[t]he Church did not raise this issue in its original appeal," *id.* Of course, the Church *prevailed* on the privilege issue in the district court; *the government* appealed this issue, not the Church. Pet. 6 n.3. Petitioner submits that the court below paid the same "careful[ ]" attention to the crime-fraud issue as it did to the procedural posture of this case.

## CONCLUSION

For the reasons stated herein and in the petition, the petition for a writ of certiorari should be granted.

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March 7, 1991

Respectfully submitted,

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